85-1570

Supreme Court, U.S.
FILED
APR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

IN RE GEORGE ABDALLAH

RICHARD DRURY, ADMINISTRATOR, Petitioner

EVA ABDALLAH, Respondent

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision by the District Court affirming the order of the Bankruptcy Court and remanding for further factual proceedings is ripe for review (i.e. whether the decision is final and appealable at this stage.
2. Whether the findings of fact by the District Court are correct in determining that the requirements of 11 U.S.C. §363(h) (1)-(3) were absent.
3. Whether the non-debtor spouse holding properties as a co-tenant by the entirety had standing to object to a sale pursuant to 11 U.S.C. §363(h).

LIST OF PARTIES

1. Richard Drury, Administrator, Creditor-Petitioner.

2. Eva Abdallah, non-debtor spouse of the decedent debtor, Respondent.

3. Allen H. Roffman, Trustee, and Donahue & Donahue, Creditor were Appellants in the U.S. District Court and the U.S. Court of Appeals (No. 85-1152 and No. 85-1105). These appeals were heard along with the petitioner's as consolidated actions at both appellate levels and involved the same issues for review. Their appeals were dismissed by the U.S. Court of Appeals for lack of appellate jurisdiction by a judgment dated December 2, 1985. By order of the U.S. Court of Appeals for the First Circuit and dated December 31, 1985, the Court remanded these appeals to the U.S. District Court for a factual determination as to whether their appeals were timely filed.

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REPORTED DECISIONS IN THE COURTS BELOW

The decision by the U.S. Court of Appeals for the First Circuit is reported at 778 F.2d 75 (1st Cir. 1985). The decision of the U.S. District Court for the District of Massachusetts is reported at 46 B.R. 718 (D.Mass. 1984) and the opinion of the U.S. Bankruptcy Court is reported at 39 B.R. 384 (Bkrtcy.Mass. 1984).

GROUNDS FOR JURISDICTION

The appellant asserts that this Court has appellate jurisdiction pursuant to 28 U.S.C. §1254(1). The U.S. District Court affirmed the decision of the Bankruptcy Court, but remanded it for further factual proceedings. The U.S. Court of Appeals decided that it was without appellate jurisdiction and remanded it back for these further proceedings. The respondent Eva Abdallah contends that this Court is without jurisdiction in that there is no final judgment from either the District

Court or the Court of Appeals from which an appeal can properly be taken.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this matter is the Fifth Amendment to the U.S. Constitution. The statutory provisions involved herein are 11 U.S.C. §§§541(a)(1), 363(h), 725 and 28 U.S.C. §158(d). In addition, Bankruptcy Rule 8013 is also involved in this appeal. Those provisions not included in petitioner's Appendix, the U.S. Constitution Fifth Amendment, 11 U.S.C. §543(a)-(c)(1) and Bankruptcy Rule 8013, are set forth in this Appendix herein.

STATEMENT OF THE CASE

Mary T. Abdallah died in 1965 leaving four (4) children as her heirs. One of these heirs was the debtor, George Abdallah. The petitioner Richard Drury, as successor Administrator of the Estate of Mary T.

Abdallah, obtained a judgment against the debtor on April 10, 1978. Subsequently, two daughters of Mary T. Abdallah (also her heirs) assigned all their rights in the estate to Selma Boumil, another daughter and also an heir to the estate of Mary T. Abdallah.

In 1979 the petitioner, Richard Drury Administrator, as a judgment creditor, obtained on an ex parte basis receivership in the Massachusetts Superior Court for Middlesex County against the assets of George Abdallah and his wife, Eva Abdallah. At no time has the petitioner Drury ever obtained a judgment or an execution against Eva Abdallah. Neither has any claim against her been litigated or heard on its merits.

The debtor, George Abdallah, filed a Chapter 7 Bankruptcy Petition on October 8, 1980 with the U.S. Bankruptcy Court for the District of Massachusetts (Docket No. 80-01759-L). At the time the debtor filed his bankruptcy petition and at all times relevant

and material to this appeal, the debtor was married to Eva Abdallah. At the time the debtor filed his bankruptcy petition, he was the joint owner of certain parcels of real property in Tyngsboro and Lowell, Massachusetts. The title to these parcels of real property was held in the name of the debtor and Eva Abdallah, husband and wife, tenants by the entirety. The title to these parcels remained in a tenancy by the entirety throughout the bankruptcy proceedings. All the real property was listed on the debtor's schedule of assets.

On July 28, 1981, while the bankruptcy proceeding was still pending the debtor, George Abdallah, died. At the time of his death there had been no activity undertaken by the trustee in bankruptcy or by any of the creditors against the parcels of property held in a tenancy by the entirety. On July 29, 1982, a full year after the debtor's death, the trustee in bankruptcy filed an adversarial

motion to sell the debtor's real estate under §363(h) and §725 of the U.S. Bankruptcy Code. Eva Abdallah, the debtor's wife, filed an answer and objection to the trustee's adversarial motion. The widow contended that she was the full title holder of all the parcels of property held in a tenancy by the entirety by virtue of her surviving the debtor. After a hearing on January 13, 1983 wherein the Court considered the adversarial motion and the written objection thereto, the Court denied the trustee's motion.

Thereafter, on June 13, 1983, Richard Drury, the Administrator of the Estate of Mary T. Abdallah (the debtor's mother) by his attorney, S. James Boumil (the debtor's nephew), brought a motion to compel the sale of these parcels of real estate which had been held by the debtor and Eva Abdallah as tenants by the entirety. The bankruptcy court held three hearings on January 12, 1983; May 25, 1983; and December 14, 1983 (see full

transcript of these proceedings in Appendix filed with the U.S. Court of Appeals for the First Circuit, Page A98-A182). After these hearings and after consideration of all the briefs filed by the parties, the bankruptcy court issued an order dated April 12, 1984 denying the motion to compel the sale of the parcels of real estate.

Thereafter, on April 23, 1984 (after filing a motion to extend time with the bankruptcy court), a notice of appeal was filed by Richard Drury appealing the bankruptcy court's order of April 12, 1984. Subsequently, on May 23, 1984, the trustee Roffman filed his notice of appeal. The creditor, Donahue & Donahue, filed its notice on May 24, 1984. Both these appellants filed their notices outside the ten (10) day limit of First Circuit Appendix D Rule 3(a).

On December 27, 1984, U.S. District Court Judge Walter J. Skinner issued his memorandum and order affirming on other grounds the

bankruptcy court's ruling. The Court stated that the property held by the debtor and his spouse as tenants by the entirety at the commencement of the bankruptcy proceeding, could not be sold pursuant to 11 U.S.C. §363(h), after the death of the debtor. The petitioner Drury, in his brief to the district court, first raised the issue that the debtor's wife, Eva Abdallah, held these properties through a fraudulent conveyance. As a result, the district court remanded the case back to the bankruptcy court for an evidentiary hearing on the issue of whether the proported tenancy by the entirety was in fact a fraudulent conveyance.

The petitioner Drury along with the trustee Roffman and the creditor Donahue & Donahue, appealed the matter to the U.S. Court of Appeals for the First Circuit. The co-tenant by the entirety, Eva Abdallah, filed two motions to dismiss these appeals. She contended that the decision by the district

court was not "final" within the meaning of 28 U.S.C. §158(d); therefore, the court of appeals was without appellate jurisdiction. In addition, Eva Abdallah as appellee stated that the creditor-appellant, Donahue & Donahue, and the trustee-Appellant, Roffman in failing to file their timely notices of appeal from the bankruptcy court, were improper parties to the appeal.

The appellants and the appellee, Eva Abdallah, filed their briefs on the merits and the court of appeals heard oral argument. On December 2, 1985 the Court issued its judgment and opinion. The Court concluded that the appeal by the appellant Drury be dismissed for lack of appellate jurisdiction (as being premature). In addition, the Court dismissed the appeals of the creditor-appellant, Donahue & Donahue, and the trustee-appellant, Roffman for their failure to timely file their notices of appeal. Subsequently, the court of appeals denied the appellants' motion for a rehearing.

The Court, however, entered a corrected judgment on December 31, 1985 remanding to the district court to determine the issue of whether the appellants, Donahue & Donahue, and Roffman timely filed their appeals.

Afterward, the appellant Drury petitioned this Court for a writ of certiorari.

ARGUMENT

1. The Decision By The District Court Affirming The Bankruptcy Court's Order And Remanding It Back For Further Factual Proceedings Is Not a "Final" Order Within The Meaning Of 28 U.S.C. §158(d)

The bankruptcy court entered an order that the debtor's estate had no interest in the properties which had been held by the debtor as a co-tenant by the entirety. Because the debtor was survived by his wife, the Court could not authorize a sale pursuant to §363(h) of the Bankruptcy Code. As appellants on appeal, the creditor Donahue & Donahue and the trustee Roffman along with your petitioner raised, for the first time, an

issue regarding these properties. That is, they stated that the decedent debtor and his surviving spouse had held these properties as a sham in fraud of their creditors. The district court affirmed the decision by the bankruptcy court; however, as a result of this new allegation, the Court remanded the case back to the bankruptcy court for further factual proceedings on this matter.

Under 28 U.S.C. §158(d), there must be a final order or decision by the bankruptcy court before the U.S. Court of Appeals can have appellate jurisdiction. A number of circuits have ruled on the issue of finality when the district court has remanded to the bankruptcy court for further factual proceedings.

The petitioner Drury cites Matter of Marin Motor Oil, Inc., 689 F.2d 445 (3rd Cir. 1982) as supporting his position. In the facts before that appeal, the district court reversed the decision of the bankruptcy court

and did not remand it for further proceedings. As the Court noted, the adversarial proceedings between the parties continued in the bankruptcy court "unaffected by the appeal", 689 at 449 n.2. In addition, the Court in making its ruling stated:

> Where, as in the present case, an appeal is taken from a district court order reversing the bankruptcy court, it may be necessary to examine the district court's analysis as well as that of the bankruptcy court, 689 F.2d at 448 (emphasis in original).

In the instant case, the appeal is not from a district court reversing the bankruptcy court, but affirming the bankruptcy court. The Third Circuit also observed that should it reverse the district court's order, that all further litigation between the parties would be precluded. Here, there is no indication that a reversal of the district court will obviate the need for further litigation between the parties. Also, the parties have not continued to litigate in the bankruptcy court the issue

of title to these properties as was the case in the Marin court. It should also be noted that the Third Circuit announced its narrow holding in its opinion:

> But it is important to stress the limited nature of our holding on jurisdiction. We hold only that when the bankruptcy court issues what is indisputably a final order, and the district court issues an order affirming or reversing, the district court's order is also a final order for the purposes of section 1293(b). Matter of Marin Motor Oil, Inc., 689 F.2d 445, 449 (3rd Cir. 1982).

In a later decision the Third Circuit further refined its position, In re Comer, 716 F.2d 168 (3rd Cir. 1983). The bankruptcy court denied a relief from stay to a secured creditor so he could foreclose on a lot owned by debtor. The district court reversed on appeal and remanded it to the bankruptcy court regarding the application of the mortgage sale proceeds. The Third Circuit held that a review of district court action lifting the stay, would end the controversy between the

parties and that review could not await final disposition of the case in the bankruptcy court. It also noted that even if the district court disposed of a discreet issue, the decision could be final but remain an interlocutory decision concerning the underlying controversy, Marin, 716 at 172. In the case at bar, if the court of appeals reviews the district court order, it may not end the controversy between the parties. In addition, there is no indication that further review cannot await the further factual proceedings in the bankruptcy court. Most importantly, the district court decided that the debtor's estate had no interest to sell the properties which had been held by the debtor as a tenant by the entirety with his non-debtor spouse; however, the underlying controversy of whether a valid tenancy by the entirety existed at all has yet to be determined by the bankruptcy court. These holdings by the Third Circuit do not help the

petitioner, but in fact support the respondent Eva Abdallah's position.

The Fifth Circuit in the appeal of In re Emerald Oil Company, 694 F.2d 88 (5th Cir. 1982) (per curiam) declared that if a matter awaits further proceedings in the bankruptcy court, the decision by the district court is not appealable as a final judgment. The Court further stated that if there was no final determination of the rights between the parties, there was no appellate jurisdiction from the district court to the court of appeals, 694 at 89. The instant case awaits further proceedings concerning the status of title to these properties. Litigation between the petitioner Drury and the respondent Abdallah will proceed on remand in the bankruptcy court; see In re Delta Services Industries, Etc., 782 F.2d 1267 (5th Cir. 1986).

The Seventh Circuit in construing the recently enacted 28 U.S.C. §158(d), held that

remands by the district court to the bankruptcy court are not appealable as a final decision; Matter of Riggsby, 745 F.2d 1153 (7th Cir. 1984). The Court (as well as the Third Circuit) viewed such matters as an interlocutory appeal. The proceedings between the petitioner Drury and the respondent Abdallah is a separate adversarial proceeding within the overall bankruptcy case regarding a controversy over these parcels of real estate. When the issue of the validity to the real property is determined by the bankruptcy court, then this separate proceeding within the bankruptcy case will be final and appealable.

The petitioner Drury cites In re Bestmann, 720 F.2d 484 (8th Cir. 1983) as a case in his favor. In that instance the bankruptcy court determined the issue of the ownership of certain hogs. On appeal, the district court considered the matter an interlocutory order, and dismissed the appeal.

The Eighth Circuit reasoned that it was a final decision in that a refusal to hear the appeal by the court of appeals would forever preclude the issue. Thus, the matter would never receive appellate review. In the case at bar, the district court did not dismiss the appeal, and in fact heard the appeal on the merits. In addition, it remanded it for further factual findings. Unlike the situation in Bestmann, a reversal of the district court decision would not eliminate further litigation between the parties. In addition, the issue of the validity of the title to the parcels of real property still must be decided by the bankruptcy court. The ruling by the district court is capable of appellate review following the factual proceedings in the bankruptcy court.

A similar factual situation was involved in In re Leimer, 724 F.2d 744 (8th Cir. 1984), also cited by the petitioner. The bankruptcy court ruled on the ownership of the land in

question and refused to lift the automatic stay. The district court on appeal viewed the lower court action as an interlocutory matter and in doing so, dismissed the appeal. The Eighth Circuit observed that if the district court did not review the matter, appellate review of the issue must wait until the entire bankruptcy proceeding was concluded. Here, the district court did take appellate jurisdiction and ruled on the issue. Unlike the court in Leimer, the district court remanded it for further factual proceedings. These proceedings will involve the same parties involving a related issue concerning these parcels of real estate. Further, the Court of Appeals for the First Circuit will have an opportunity for appellate review of the issue that was before the district court below. The review by the court of appeals will not be delayed until the overall bankruptcy proceeding is terminated, but only after the factual proceeding on remand is

heard by the bankruptcy court.

The Eighth Circuit, however, did rule on the issue of finality in factual circumstances similar to the case at bar. In the Matter of Hansen, 702 F.2d 728 (8th Cir. 1983) (per curiam) cert. den. 103 S.Ct. 3539, the bankruptcy court decided on a dispute of a claim by a creditor. The district court on review remanded the matter to the bankruptcy court for a de novo trial on an additional factual issue. The court of appeals dismissed the appeal as interlocutory and not a final appealable order.

In short, the Eighth Circuit cases of In re Bestmann, supra, and In re Leimer, supra, cited in support by the petitioner Drury, are clearly distinguishable. The procedural background in those cases are in no way similar to the case before this court. In the Hansen case the district court, upon review, remanded the matter to the bankruptcy court for further factual proceedings. As in

Hansen, the decision by the district court is not final or appealable.

Five cases have been recently decided in the Fifth Circuit concerning finality of bankruptcy matters appealed to the court of appeals. The bankruptcy court, In re Exennium, Inc., 715 F.2d 1401 (9th Cir. 1983) made findings relating to the validity of the sale of certain leases. The Bankruptcy Appellate Panel noted the doctrine of Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) allows appellate review when dismissing the appeal would impede the litigation. In Exennium, the title to the leases had already been decided. During the appellate process, the overall dispute was complicated by uncertainty over responsibility for past-due rents owed the lessor; appellate review at that stage would resolve the matter. In the present case, the bankruptcy court, as fact finder, has not ruled upon the validity of the title to the real property held by the

respondent Abdallah. This interrelated issue should be first decided at the trial level. Unlike Exennium, the facts before this Court involve a remand back to the bankruptcy court.

In the facts before the Court in the later decision of In re Martinez, 721 F.2d 262 (9th Cir. 1983), the Appellate Panel remanded the case to illuminate the bankruptcy court's order. The issue for determination on remand was, inter alia, the form of title of the jointly held real property. The Fifth Circuit reasoned that appellate review at this juncture would cause splintering of the adjudication process. The Court concluded that in light of the remand, the decision was interlocutory.

The petitioner Drury refers to In re Sambo's Restaurants, Inc., 754 F.2d 811 (9th Cir. 1985). The earlier decision by the bankruptcy court determined the validity of a purported proof of claim. The district court on appeal reversed the bankruptcy court and

allowed the appellant to file an amended proof of claim. The Ninth Circuit rightly applied the doctrine in Gillespie v. United States Steel Corp., supra; if it reversed the decision by the district court, the litigation between the parties would effectively end. The validity of the underlying proof of claim (already considered by the bankruptcy court below), is a prerequisite before any further litigation over the negligence claim itself.

In the case at bar, there was a remand by the district court; this was not the situation in the Sambo's case. Secondly, any reversal by the court of appeals would not end the litigation. The essential issue of validity to the title to the real properties must still be decided. In Sambo's, the bankruptcy court had adjudicated the issue of validity; here, the Court must still determine the validity of the title to the real estate. This is an essential step before any appellate review of the debtor's interest for a sale under §363(h)

of the Code.

The Ninth Circuit, In re Four Seas Center, Ltd., 754 F.2d 1416 (9th Cir. 1985) refined its earlier holding In re Martinez, supra. For appellate jurisdiction, it remarked that the lower court must finally decide a "discreet issue". The Ninth Circuit in Four Seas declared:

> When further proceedings in the bankruptcy court will affect the scope of the order, the order is not subject to review in this court under §1293. [The former §158(d)] [cite] 754 F.2d at 1418.

The Court ultimately dismissed the appeal as an interlocutory matter. In the instant case, there are further adversary proceedings on remand regarding the real property in question. The issue of validity of the title to the realty clearly affects the "scope of the order" by the bankruptcy court concerning any sale under §363(h) of the Code. As such, the petitioner Drury's is nonappealable.

In the latest relevant Ninth Circuit case, the Bankruptcy Appellate Panel had affirmed the trial court's decision, In re Stanton, 766 F.2d 1283 (9th Cir. 1985). The Panel, however, remanded to the bankruptcy court for further consideration. The Ninth Circuit reaffirmed its holding in In re Four Seas Center, Ltd., supra. Since the adversary proceedings had not ended and the bankruptcy court must still resolve the controversies between the parties, there is no "final order", Stanton 766 F.2d at 1286. In this latest decision, the Ninth Circuit addressed its earliest decision of Sambo's upon which your petitioner Drury relies:

> At first glance, Sambo's and Martinez seem difficult to reconcile. But, in fact, the cases compliment one another. Sambo's holds that when a bankruptcy court issues a final order and the BAP affirms or reverses, its order is final... [cite] Martinez holds that when the BAP remands for further factual findings related to a central issue raised on

> appeal, that order is not final, and we lack jurisdiction. [cite] [emphasis in original].

The Court further remarked that in light of a remand, it was reluctant to encroach upon the bankruptcy court's fact finding role.

In the case at bar, the bankruptcy court did remand for further factual findings the issue of validity of the title held in a tenancy by the entirety. This is interconnected with authority to sell any interest under §363(h) of the Code. As the Court wisely observed in Stanton, if it reviewed the matter, it may have resulted in "two complete trips through the appellate process", 766 F.2d at 1287. Here too, there may be two separate appeals involving the same parties and related issues. This latest opinion of Stanton indicates the controlling case for the Ninth Circuit.

The Tenth Circuit in the Matter of Glover, 697 F.2d 907 (10th Cir. 1983) (per curiam), the district court remanded to the

bankruptcy court for further proceedings. The Court held that such actions within the bankruptcy framework are not "final". A similar procedural background occurred in the Matter of Commercial Contractors, Inc., 771 F.2d 1373 (10th Cir. 1985). Here again, the district court had remanded the case to the bankruptcy court for further factual hearings. The Tenth Circuit renewed its finality standard that such district court orders are not final or appealable. In this case on petition to this court, the district court also remanded to the bankruptcy court for further proceedings.

The Eleventh Circuit In re Regency Woods Apartments, Ltd., 686 F.2d 899 (11th Cir. 1982), the bankruptcy court reversed the district court decision and remanded for further factual findings. The court did not view the matter as final. Thus, the court of appeals did not have appellate jurisdiction. Here, too, the First Circuit was without

jurisdiction to review what is an interlocutory order.

In sum, the First, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits all support the principle that courts of appeal lack appellate jurisdiction to review district court decisions upon remand to the bankruptcy court. The Third and Eighth Circuit cases cited by your petitioner are distinguishable on the facts from those in the instant case.

In the case at bar, the remand issue of the validity of the title is closely related to the issue of any authorization of sale of these properties under §363(h). Also, the matter has not been completely resolved and the petitioner Drury can raise the matter at any later appeal. Therefore, the collateral order exception does not apply in the present case, Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Neither will the petitioner Drury suffer irreparable injury if appellate review is delayed. See Forgay v.

Conrad, 47 U.S. 201 (1848).

2. The District Court, In Reviewing The Bankruptcy Court's Order, Made The Proper Findings Of Fact That The Requirements Of 11 U.S.C. §363(h)(1)-(3) Were Absent

The respondent Abdallah will not address the merits involved in this issue. It would be premature to do so when the court of appeals below has not reviewed this matter.

It should be noted that the petitioner Drury, in his petition before this Court, has attached in the Appendix certain documents in support of his position. Both the Massachusetts state court Order Appointing Receiver at A-75 and the transcript of testimony of Eva Abdallah in a state court proceeding at A-79 to A-82 was not filed at any of the hearings before the bankruptcy court, nor were they included in any of the appeal briefs below. This Court should strike from the Appendix those portions which were not in the record below, Commonwealth of Massachusetts v. U.S. Veterans Administration,

541 F.2d 119 (1st Cir. 1976); Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973) cert. den. 414 U.S. 1161. In addition the petitioner has included selected portions from the transcripts of the bankruptcy hearings. The quotations by the Court are greatly taken out of context. The statement by the Court that there is a severance of a tenancy by the entirety upon the filing of a bankruptcy petition is nothing but musings from the bench. After an additional hearing on December 14, 1983, and after the filing of Briefs by the parties, the Court made a formal written memorandum and order of April 12, 1984.

The transcripts of the bankruptcy hearings are replete with pronouncements by the Court that Massachusetts law determines the nature and extent of the debtor's interest in the real properties. The district court determined the debtor's estate had lack of such interest in the properties. Thus, the

requirement of §363(h)(3) before a sale was absent with this finding of the court. For it is the debtor's interest, if any, and only his interest in the realty which is included in the debtor's estate pursuant to 11 U.S.C. §541(a)(1) [See U.S. Court of Appeals Appendix A-98 to A-181].

3. The Respondent Eva Abdallah, As Owner Of The Real Property, Has Standing To Object To A Sale Pursuant To 11 U.S.C. §363(h)

The petitioner holds a judgment against the decedent debtor. Prior to the filing of the bankruptcy petition, the petitioner Drury commenced receivership proceedings against the assets of the debtor and his non-debtor spouse (your respondent Eva . Abdallah). The petitioner has no judgment or execution against Eva Abdallah.

The Massachusetts courts appoint a receiver for an individual under its general equity powers. The receiverships of individuals are of a limited type, Nolan,

Mass. Practice, Equitable Remedies §§163, 165. The purpose of such receiverships is to place the assets of the defendant into the possession and control of the court, Stockbridge v. Mixer, 215 Mass. 415, 102 N.E. 646 (1913). The property in the possession of a receiver is in custodia legis prior to any determination of rights in that property. C.J.S., Receivers §104.

While the possession and control of the property is placed into the hands of the receiver, title to such property is not affected by the appointment itself, Wellman v. North, 256 Mass. 496, 152 N.E. 886 (1926). The appointment of a receiver does not divest the owner of the title to the property, Bell v. American Protective League, 163 Mass. 558, 40 N.E. 857 (1895), for as C.J.S. Receivers §105 states:

> An ordinary receiver appointed under the general powers of the court does not, by the mere fact of his appointment, become vested

> with any title or estate in the property involved, since, as discussed supra, §104, he is a mere custodian thereof for the court... [footnote omitted].

In fact, the court in Wellman specifically distinguished those receivers in the state of New York who, by specific statutory authority, received title to the property.

The Massachusetts cases cited by your petitioner are distinguishable. The facts involve either a corporate receiver (not for an individual), or a receiver who was appointed pursuant to a narrow statutory authority. Massachusetts receivership proceedings are not an end in itself, but only to conserve assets pending further proceedings Wilson v. Waltham Watch Co., 293 F.2d 811, 814 (D.Mass. 1924) (applying Mass. law); Nigro v. First National Bank of Boston, 7 Mass.App. 705, 322 N.E.2d 782 (1975).

The state court receiver, as custodian of the debtor's interest in the properties, was

required to turn over such property to the trustee at the commencement of the case, 11 U.S.C. §543 (a), (b). Without the custody and control of the real property in question, it is the trustee who is without standing to assent to a sale of these properties.

In the case at bar, notification of all interested parties of their opportunity to be heard at a hearing is a requirement before a sale under §363, In re Robert L. Hallmore Corp., 40 B.R. 181 (Bank.Mass. 1984). Since the respondent Eva Abdallah hold an interest in the title to these real properties, she must be notified and heard before a sale of her interest in these properties, Fuentes v. Shevin, 407 U.S. 67 (1972); U.S. Constitution Amendment 5. Since the respondent Eva Abdallah retains title to these properties, due process mandates that she be afforded an opportunity to be heard before any such sale of her property under 11 U.S.C. §363(h). The bankruptcy court below was fully justified in

giving her such an opportunity, see 11 U.S.C. §543(c)(1).

CONCLUSION

The issue of title to these properties is still unresolved. This matter was remanded by the district court. This remand is for a clarification of a central, factual issue of the case. In addition, the First Circuit remanded to the district court for a determination of whether two of the appellants had timely filed their notices of appeal. The appellate courts should decide this matter as a whole, especially in light of the Court of Appeals' remand. Otherwise, the courts could well hear a second appeal by the same parties involving a similar related issue. This matter is premature for any appellate review. A consideration at this stage would involve unneccessary appeals and piecemeal review. Further, it would require additional judicial time and expense; the district court decision

is not "final" and appealable.

James M. Langan, Jr.
Counsel for Respondent

APPENDIX

U. S. CONSTITUTION, AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall be private property to be taken for public use, without just compensation.

11 U.S.C. §543(a)-(c)(1)

Turnover of Property by a Custodian

(a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor,

proceeds of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

(b) A custodian shall--

(1) deliver to the trustee any property of the debtor transferred to such custodian, or proceeds of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and

(2) file an accounting of any property of the debtor, or proceeds of such property, that, at any time, came into the possession, custody or control of such custodian.

(c) The court, after notice and a hearing shall--

(1) protect all entities to which a custodian has become obligated with respect to such property...

RULE 8013

DISPOSITION OF APPEAL; WEIGHT ACCORDED BANKRUPTCY JUDGE'S FINDINGS OF FACT

On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court's judgment, order or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.